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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Erin Rae Espinosa,

10 Petitioner,

11 v.

12 Charles L. Ryan, et al.,

13 Respondents.

No. 2:18-CV-02479-RM

**ORDER**

14 Pending before the Court is Petitioner Erin Rae Espinosa's Petition for Writ of  
15 Habeas Corpus pursuant to 28 U.S.C. § 2254. (Doc. 1.) On March 6, 2020, Magistrate  
16 Judge D. Thomas Ferraro issued a Report and Recommendation ("R&R"), recommending  
17 that the § 2254 Petition be denied. (Doc. 29.) Petitioner filed an Objection (Doc. 30), to  
18 which Respondents filed a Reply (Doc. 32). Petitioner also filed a Notice of Supplemental  
19 Authority pertaining to the prosecutorial misconduct arguments raised in Ground One of  
20 her Petition. (Doc. 31.) For the following reasons, the Objection will be overruled, the R&R  
21 adopted, and the § 2254 Petition denied.

22 **I. Background**

23 In November 2014, the State of Arizona charged Petitioner with one count of  
24 aggravated driving under the influence ("DUI"). (Doc. 21-1 at 3-4.) The Arizona Court of  
25 Appeals summarized the evidence underlying Petitioner's offense as follows:<sup>1</sup>  
26

27 <sup>1</sup> The state court's factual findings are entitled to a presumption of correctness pursuant to  
28 28 U.S.C. § 2254(e)(1). Petitioner has the burden of rebutting the presumption of  
correctness with clear and convincing evidence. *Runneagle v. Ryan*, 686 F.3d 758, 762  
n.1 (9th Cir. 2012).

1  
2 ¶2 In the afternoon of August 18, 2011, Michelle Murphy  
3 waited in her parked car to pick up her daughter from school.  
4 Espinosa was also parked in the lane of waiting cars and was  
5 five or six feet directly in front of Murphy. After a few minutes,  
6 Espinosa's vehicle rolled backwards and collided with  
7 Murphy's car. Murphy exited her vehicle to check on Espinosa  
8 who appeared "dazed" and responded negatively to Murphy's  
9 stated intent to call the police. Before arriving at the school,  
10 Murphy had observed Espinosa driving erratically.

11 ¶3 Another parent contacted police officer Kunde who was  
12 nearby, and Kunde responded to the scene. As the officer  
13 talked with Espinosa through her open driver side window, he  
14 noticed an ignition interlock device near the middle console,  
15 and Espinosa's vehicle rolled forward and backward a couple  
16 times before Kunde directed her to park in the school's  
17 driveway. As she pulled away, Espinosa drove over the curb  
18 before coming to a stop. When Espinosa exited her vehicle to  
19 look for her driver license and registration in the back of the  
20 vehicle, she was "very unstable on her feet" and "wobbling[.]"  
21 Espinosa informed Kunde that she had not been drinking, but  
22 she had taken three doses of her prescribed clonazepam earlier  
23 that day.[.] She did not find her license, which the state  
24 subsequently learned was revoked and subject to a number of  
25 restrictions.[.]

26 ¶4 Kunde administered field sobriety tests, and Espinosa  
27 exhibited numerous signs of impairment. A horizontal gaze  
28 nystagmus test revealed six out of six clues of possible  
neurological impairment. Kunde arrested Espinosa, and after  
reading her the "admin per se implied consent" form, a  
phlebotomist obtained Espinosa's consent to draw two samples  
of blood. The phlebotomist also advised Espinosa of her right  
to an independent blood test. The state's testing of one of the  
blood vials indicated an amount of clonazepam approximately  
twice the upper limit of the therapeutic range.

(Doc. 21-3 at 67-8.) In October 2016, the sixth time the State had brought and then  
dismissed the same DUI charge, a jury found Petitioner guilty of one count of aggravated  
DUI and determined that she committed the offense while on probation for a felony  
offense. (Doc. 21-1 at 13-15, Doc. 26 at 21.) The trial court sentenced Petitioner to a

1 presumptive term of 2.5 years of imprisonment with thirty days presentence incarceration  
2 credit. (Doc. 21-1 at 17-21.)

3 Petitioner timely appealed her conviction. (*Id.* at 23-5.) On appeal, Petitioner  
4 presented seven claims. (*Id.* at 27-103.) On March 13, 2018, the Arizona Court of Appeals  
5 issued a memorandum decision denying Petitioner’s claims and affirming her conviction  
6 and sentence. (Doc. 21-3 at 66-82.) Petitioner filed a petition for review in the Arizona  
7 Supreme court, and the Supreme Court denied review on August 31, 2018. (*Id.* at 84-97,  
8 99, 112.) A few weeks prior, on August 8, 2018, Petitioner filed the instant Petition, which  
9 is timely pursuant to the Anti-Terrorism and Effective Death Penalty Act of 1996  
10 (“AEDPA”). (Doc. 1, Doc. 29 at 4.)

11 By Order dated August 28, 2018, District Judge Diane J. Humetewa dismissed the  
12 claims alleged in Ground Two and Part One of Ground Three because Petitioner failed to  
13 identify any federal basis for them. (Doc. 8; *see also* Doc. 1 at 42-64.) Accordingly, the  
14 Petition presents four remaining grounds for relief: (1) the prosecutor committed  
15 “numerous intentional acts of prosecutorial misconduct” that violated Petitioner’s right to  
16 due process (Ground One) (Doc. 1 at 23-36); (2) the trial court erred when it denied  
17 Petitioner’s motion for a directed verdict of acquittal pursuant to Rule 20 of the Arizona  
18 Rules of Criminal Procedure because the evidence was insufficient (Part Two of Ground  
19 Three) (*id.* at 59-64); (3) the trial court erred when it denied reconsidering its ruling denying  
20 Petitioner’s motion to suppress evidence because the State had waived its alternative  
21 argument, pursuant to A.R.S. § 13-3925, that the good faith exception applied (Ground  
22 Four) (*id.* at 64-70); and (4) the trial court erred when it denied Petitioner’s motion for  
23 alternative relief, including dismissal of the charge with prejudice, based on the State’s  
24 violation of its duty to preserve a blood sample for Petitioner’s independent chemical  
25 analysis (Ground Five) (*id.* at 70-74).

26 On December 6, 2018, Respondents filed a Limited Answer to the Petition. (Doc.  
27 21.) In the Limited Answer, Respondents argue that Ground One should be denied because  
28 all except for one of the claims alleged (that the prosecutor committed misconduct during

1 rebuttal closing argument) are technically exhausted but procedurally defaulted without  
2 excuse. (*Id.* at 6-12.) They further argue that the remaining claim in Ground One lacks  
3 merit and the Arizona Court of Appeals' rejection of it was a reasonable application of  
4 clearly established federal law. (*Id.* at 20-25.) Respondents argue that Part Two of Ground  
5 Three should be denied because it is procedurally defaulted without excuse. (*Id.* at 5-9, 12-  
6 17.) Respondents argue that Ground Four should be denied because it is precluded from  
7 habeas review pursuant to *Stone v. Powell*, 428 U.S. 465 (1976) and is properly  
8 characterized as a state law claim and not a Fourth Amendment claim. (*Id.* at 18-20.) Lastly,  
9 Respondents argue that Ground Five should be denied because it is without merit and the  
10 Arizona Court of Appeals' rejection of it was a reasonable application of clearly established  
11 federal law. (*Id.* at 20-27.)

12 On February 10, 2019, Petitioner filed a Reply. (Doc. 26.) In the Reply, Petitioner  
13 argues that the State's procedural default argument lacks merit for two reasons: (1) the state  
14 courts did not impose a procedural bar that this Court should respect under the adequate  
15 and independent state grounds doctrine and (2) Petitioner can show good cause and a  
16 fundamental miscarriage of justice to excuse any procedural default. (*Id.*) Petitioner further  
17 argues that the State has waived any argument on the merits of her claims by failing to  
18 adequately address the prejudice prong of the cause-and-prejudice aspect of its procedural-  
19 default defense. (*Id.*)

20 Prior to issuance of the R&R, Petitioner filed two supplemental notices of authority.  
21 (Docs. 27, 28.) Petitioner filed a third supplemental notice of authority after issuance of  
22 the R&R. (Doc. 31.)

## 23 II. Standard of Review

24 A district judge "may accept, reject, or modify, in whole or in part, the findings or  
25 recommendations" made by a magistrate judge. 28 U.S.C. § 636(b)(1). The district judge  
26 must "make a de novo determination of those portions" of the magistrate judge's "report  
27 or specified proposed findings or recommendations to which objection is made." *Id.* The  
28 advisory committee's notes to Rule 72(b) of the Federal Rules of Civil Procedure state that,

1 “[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear  
2 error on the face of the record in order to accept the recommendation” of a magistrate  
3 judge. Fed. R. Civ. P. 72(b) advisory committee’s note to 1983 addition. *See also Johnson*  
4 *v. Zema Sys. Corp.*, 170 F.3d 734, 739 (7th Cir. 1999) (“If no objection or only partial  
5 objection is made, the district court judge reviews those unobjected portions for clear  
6 error.”); *Prior v. Ryan*, CV 10-225-TUC-RCC, 2012 WL 1344286, at \*1 (D. Ariz. Apr. 18,  
7 2012) (reviewing for clear error unobjected-to portions of Report and Recommendation).

### 8 **III. Report and Recommendation**

9 The R&R first addresses Petitioner’s claim in Ground Four, alleging that the  
10 Arizona Court of Appeals erred in determining that the State did not waive its good faith  
11 exception argument with respect to Petitioner’s motion to suppress blood test results. (Doc.  
12 29 at 4-8; *see also* Doc. 1 at 64-70.) The R&R recognizes that federal habeas relief is  
13 unavailable on a state prisoner’s Fourth Amendment claim if the prisoner had an  
14 opportunity to litigate the claim in state court, and it finds that “[i]t is undisputed that  
15 Petitioner litigated her motion to suppress the results of her blood alcohol test in the trial  
16 court.” (Doc. 29 at 4-5.) The R&R quotes the Arizona Court of Appeals’ holding that the  
17 State had not waived its good faith exception argument with respect to the motion to  
18 suppress. (Doc. 29 at 5-6.) The R&R considers the two main federal cases relied on by  
19 Petitioner, *Miranda v. Leibach*, 394 F.3d 984 (7th Cir. 2005) and *Gamble v. State of*  
20 *Oklahoma*, 583 F.2d 1161 (10th Cir. 1978), but finds that they do not support Petitioner’s  
21 argument that Arizona courts have inconsistently applied the waiver-of-argument rule. (*Id.*  
22 at 6-8.) The R&R further determines that Petitioner’s claim in Ground Four does not  
23 concern the state court’s Fourth Amendment analysis but, rather, the proper remedy under  
24 Arizona law for the alleged violation of her Fourth Amendment rights. (*Id.* at 7-8.) Because  
25 federal relief does not lie for errors of state law, *Estelle v. McGuire*, 502 U.S. 62, 57-8  
26 (1991), the R&R concludes that the claim is barred from federal habeas review. (*Id.* at 8.)  
27 Even “generously construing” the claim as a Fourth Amendment claim, the R&R finds it  
28 barred by *Stone v. Powell*. (*Id.*)

1           The R&R next finds that Petitioner's claims in Ground One (except the claim of  
2 prosecutorial misconduct during rebuttal closing argument, which it addresses on the  
3 merits) and Part Two of Ground Three are procedurally defaulted. (*Id.* at 8-15.) The R&R  
4 quotes the Arizona Court of Appeals' finding that Petitioner had waived and abandoned all  
5 but one of the prosecutorial misconduct claims asserted in Ground One by failing to  
6 properly develop the arguments, failing to cite to applicable supporting authority, and  
7 failing to indicate where in the record she objected on prosecutorial misconduct grounds.  
8 (*Id.* at 11-12.) In finding waiver, the Arizona Court of Appeals relied on Ariz. R. Crim. P.  
9 31.13(c)(1)(vi) (renumbered effective January 1, 2018 as Rule 31.10(a)(7)). (*Id.* at 12.)  
10 The R&R considers whether the application of Rule 31.10(a)(7) is firmly established and  
11 regularly followed in Arizona such that it is an adequate and independent state law ground  
12 precluding federal habeas review and finds that it is. (*Id.*) The R&R accordingly finds that  
13 the claims alleged in Ground One (except for the claim alleging prosecutorial misconduct  
14 during rebuttal closing argument) are technically exhausted but procedurally defaulted. (*Id.*  
15 at 13, 17.)

16           The R&R also finds that Part Two of Ground Three, in which Petitioner alleges that  
17 the trial court erred when it denied her motion to dismiss and for a directed verdict pursuant  
18 to Rule 20 of the Arizona Rules of Criminal Procedure, is procedurally defaulted. (*Id.* at  
19 13-15.) After reviewing the Arizona Court of Appeals' ruling affirming the trial court's  
20 denial of Petitioner's Rule 20 motion, the R&R finds that Petitioner did not fairly present  
21 Part Two of Ground Three to the Arizona Court of Appeals because she presented an  
22 insufficient evidence claim under Arizona law rather than a due process sufficiency of  
23 evidence claim. (*Id.* at 13-14.)

24           Next, the R&R finds that Petitioner cannot return to state court to exhaust the claims  
25 in Ground One and Part Two of Ground Three because Ariz. R. Crim. P. 32.2(a)(3) would  
26 operate to bar those claims. (*Id.* at 14-15.) The R&R then considers whether the  
27 procedurally defaulted claims in Ground One and Part Two of Ground Three can be  
28 excused through a showing of cause and prejudice or a fundamental miscarriage of justice,

1 and finds that, Petitioner's arguments notwithstanding, they cannot. (*Id.* at 15-18.)

2 Lastly, the R&R addresses Petitioner's exhausted claim in Ground One and the  
3 claim in Ground Five on their merits. (*Id.* at 18.) The R&R applies the standard set forth in  
4 AEDPA for determining whether habeas relief is available for a claim that was adjudicated  
5 on the merits in state court. (*Id.* at 18-19.) The R&R, upon review of the Arizona Court of  
6 Appeals' discussion and rejection of the claim in Ground One alleging prosecutorial  
7 misconduct during rebuttal closing argument, determines that Petitioner failed to argue that  
8 the Arizona Court of Appeals unreasonably applied United States Supreme Court precedent  
9 with respect to that claim. (*Id.* at 20-21.) The R&R goes on to analyze the claim in Ground  
10 One under *Darden v. Wainwright*, 477 U.S. 168 (1986), which sets forth the clearly  
11 established federal law applicable to a prosecutor's allegedly improper comments for  
12 purposes of AEDPA review, and finds that Petitioner has not satisfied AEDPA's standard  
13 of showing that the Arizona Court of Appeals' resolution of the claim was contrary to, or  
14 an unreasonable application of, clearly established federal law. (*Id.* at 21-22.)

15 In Ground Five, Petitioner alleges that the trial court erred when it denied her motion  
16 to dismiss based on the State's failure to preserve a sample of her blood for her independent  
17 chemical analysis. (*Id.* at 22-3.) The Arizona Court of Appeals addressed that claim on the  
18 merits on direct appeal and held that "Because [Petitioner] had an unfettered opportunity  
19 to obtain an independent blood sample for testing, the state did not violate her due process  
20 rights by inadvertently destroying the second blood sample." (*Id.* at 23-4.) The R&R finds  
21 that the claim raised in Ground Five of the Petition fails to explain how the Arizona Court  
22 of Appeals' decision is contrary to, or involved an unreasonable application of, clearly  
23 established federal law in violation of AEDPA. (*Id.* at 24-5.) The R&R determines that the  
24 Arizona Court of Appeals did not unreasonably apply federal law when it found that  
25 Petitioner's due process rights were satisfied. (*Id.* at 25.) The R&R further finds that there  
26 is no clearly established federal law imposing a duty on the state to collect potentially  
27 exculpatory evidence, and even if there was, Petitioner is not entitled to habeas relief on  
28 her claim in Ground Five because she cannot show the requisite bad faith and materiality

1 of the evidence pursuant to *Miller v. Vasquez*, 868 F.2d 1116, 1120 (9th Cir. 1989) (citing  
2 *Arizona v. Youngblood*, 488 U.S. 51 (1988)). (*Id.*)

#### 3 **IV. Discussion**

4 Petitioner filed an Objection to the R&R (Doc. 30), to which Respondents replied  
5 (Doc. 32). In her Objection, Petitioner argues that the R&R erred in multiple ways. (Doc.  
6 30.)

##### 7 **a. Objection One**

8 First, Petitioner argues that the R&R includes the false statement that Petitioner's  
9 license had been "revoked and restricted at the time of the incident" as a result of a prior  
10 DUI conviction. (Doc. 30 at 2; Doc. 29 at 14.) This statement, which Petitioner contends  
11 is unsupported by the record of the state court appellate proceedings, is found in the  
12 Arizona Court of Appeals' Memorandum Decision and quoted in the R&R. (Doc. 29 at 14;  
13 Doc. 21-3 at 75.) Petitioner appears to dispute whether her driver's license was revoked  
14 and restricted, as well as whether the revocation or restriction resulted from a prior DUI  
15 conviction. Petitioner recounts testimony of custodians of Motor Vehicle Division records  
16 indicating that her driver's license was restricted at the time of the incident, although there  
17 appears to be a lack of clarity around whether it was revoked, and whether the restriction  
18 was due to a DUI conviction. Petitioner has not explained how any potential confusion  
19 around whether her license was revoked, restricted, or both, affected the outcome of her  
20 case. In her Reply to the Limited Answer (Doc. 26), she attached a copy of the trial court  
21 jury instructions, which provide that the State had to show beyond a reasonable doubt that  
22 Petitioner's license was either revoked or restricted, but not both. (Doc. 26-1 at 24-28.)  
23 Furthermore, Petitioner does not explain how her Objection undermines the R&R's  
24 recommended resolution of any of her habeas claims. The Objection appears to relate to  
25 Part Two of Ground Three, alleging that the trial court erred when it denied Petitioner's  
26 motion for a directed verdict of acquittal. However, the Objection does not affect the  
27 R&R's conclusion that Petitioner failed to present Part Two of Ground Three as a federal  
28 constitutional claim to the state courts.

1           **b. Objection Two**

2           Next, Petitioner argues that the R&R “omits numerous factual and procedural  
3 matters established by the record that are necessary for a full and fair determination of  
4 Petitioner’s prosecutorial misconduct claim and her denial of due process claim.” (Doc. 30  
5 at 3.) Petitioner identifies two “factual and procedural matters,” the omission of which she  
6 contends constitutes error in the R&R: one, that the State’s five prior cases against  
7 Petitioner for the same DUI offense were all dismissed, without prejudice, on the State’s  
8 motion,<sup>2</sup> and two, the details surrounding the State’s destruction of her blood kit in  
9 September 2014, over 60 days before Petitioner’s second jury trial, which prevented her  
10 from obtaining an independent test. (*Id.*)

11           The R&R finds that all but one of Petitioner’s prosecutorial misconduct claims are  
12 procedurally defaulted, based upon the Arizona Court of Appeals’ finding that the claims  
13 had been waived because they were not properly developed. (Doc. 29 at 11-13.) Petitioner  
14 does not explain how the R&R’s procedural default analysis is undermined by its failure  
15 to discuss the fact that the State’s five prior cases against Petitioner for the same DUI  
16 offense were dismissed without prejudice. The R&R’s omission of this fact does not show  
17 any error in the R&R’s conclusion that all but one of Petitioner’s prosecutorial misconduct  
18 claims are procedurally defaulted.

19           As for the R&R’s alleged omission of the factual details surrounding the State’s  
20 destruction of Petitioner’s blood kit before she could independently test it, Petitioner has  
21 not specifically explained how or why the R&R’s findings on Ground Five (Doc. 29 at 22-  
22 26) are in error. (Doc. 30 at 3-4.) Petitioner incorporates by reference pages 11 through 23  
23 of her Petition, which set forth the procedural and factual background of the case. (*Id.* at  
24 4.) On de novo review, this Court finds no error in the R&R’s recitation of the factual  
25 background regarding Ground Five. (*See* Doc. 29 at 22-3.) Nor has Petitioner met her  
26 burden of rebutting, by clear and convincing evidence, the presumption of correctness of

27           <sup>2</sup> With respect to the first alleged omission, Petitioner states that she incorporates by  
28 reference pages 12 through 15 of her Reply (Doc. 26), but she quotes page 12 of her Petition  
and it appears that she intended to incorporate the factual background set forth in pages 12  
through 15 of the Petition (Doc. 1).

1 the state court's factual findings regarding the destruction of her blood kit. (Doc. 71-3 at  
2 77-78); 28 U.S.C. § 2254(e)(1); *see also Runnigeagle v. Ryan*, 686 F.3d 758, 762 n.1 (9th  
3 Cir. 2012).

4 **c. Objection Three**

5 Petitioner contends that the R&R erred in rejecting her argument that she qualifies  
6 for an exception to the Fourth Amendment preclusion rule established in *Stone v. Powell*,  
7 428 U.S. 465 (1976). (Doc. 30 at 4.) Petitioner argues that she is entitled to habeas relief  
8 on her claim in Ground Four because the Arizona Court of Appeals "did not provide an  
9 opportunity for full and fair litigation" of her Fourth Amendment claim. (*Id.*) Petitioner  
10 essentially argues that the Court of Appeals misapplied state law when it found that the  
11 State had not waived its argument that the good faith exception applied to render admissible  
12 Petitioner's blood test results. (*Id.* at 4-6.) Petitioner discusses the Arizona cases *State v.*  
13 *Valenzuela*, 239 Ariz. 229 (2016) and *Brown v. McClennan*, 239 Ariz. 529 (2016), which  
14 she contend support her argument that the Arizona Court of Appeals should have found  
15 that the State waived the good faith exception argument by not raising it at the appropriate  
16 time. (*Id.* at 4-5.)

17 "Where the State has provided an opportunity for full and fair litigation of a Fourth  
18 Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the  
19 ground that the evidence obtained in an unconstitutional search or seizure was introduced  
20 at [her] trial." *Stone*, 428 U.S. at 494-95. "The relevant inquiry is whether petitioner had  
21 the opportunity to litigate [her] claim, not whether [she] in fact did so or even whether the  
22 claim was correctly decided." *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).  
23 Although Petitioner claims that the state court's treatment of her claim in Ground Four was  
24 not a "fair" opportunity to litigate the claim, she provides no support for this argument  
25 beyond disputing the state court's application of state waiver law. (Doc. 30 at 4-5.)  
26 Essentially, Petitioner disagrees with the conclusion reached by the state court and is  
27 attempting to characterize that disagreement as a federal habeas claim. However, whether  
28 or not Petitioner's Fourth Amendment claim was correctly decided by the state courts is

1 not the issue before this Court.

2       Petitioner further contends that the R&R erred when it rejected her arguments based  
3 on *Miranda v. Leibach*, 394 F.3d 984 (7th Cir 2005) and *Gamble v. State of Oklahoma*,  
4 583 F.2d 1161 (10th Cir. 1978). (*Id.* at 6.) Petitioner argues that the R&R misapplies  
5 *Miranda* because in that case, “the court held that petitioner—not the prosecutor—had  
6 made the waiver, based upon petitioner’s express concession of waiver before the Illinois  
7 Appellate Court.” (*Id.*) The Court agrees with this reading of the case, but Petitioner’s  
8 Objection does not explain how or why the fact that the petitioner and not the prosecutor  
9 in *Miranda* was found to have waived an argument undermines the R&R’s application of  
10 *Miranda*. This Court agrees with the R&R that *Miranda* does not support Petitioner’s  
11 argument that Arizona courts have inconsistently applied the “waiver of argument” rule.  
12 The R&R does not misapply *Miranda*.

13       Nor does the R&R misapply *Gamble*. The Objection on this point makes no effort  
14 to explain to this Court how or why the R&R’s interpretation of *Gamble* is erroneous. (Doc.  
15 30 at 6.) The Objection states that “Petitioner cited *State v. Brita* [supra] and five other  
16 Arizona appellate court opinions holding that the state waives an argument in opposition  
17 to a criminal defendant’s motion by failing to preserve the argument in response to the  
18 motion.” Petitioner is again disputing the state court’s interpretation and application of  
19 Arizona state law. But “federal habeas corpus relief does not lie for errors of state law.”  
20 *Estelle*, 502 U.S. at 67.

21       Petitioner further objects that the R&R erred when it quoted A.R.S. § 13-3925(c),  
22 which provides an exception to the suppression of evidence “if the court determines that  
23 the evidence was seized by a peace officer as a result of a good faith mistake or technical  
24 violation.” (*Id.*) Petitioner contends that this statute “merely codified under state law the  
25 U.S. Supreme Court’s holding in *U.S. v. Leon*, 468 U.S. 897 (1984).” However, this  
26 argument was not raised before the magistrate judge. See *Farquhar v. Jones*, 141 F. App’x  
27 539, 540 (9th Cir. 2005) (district court properly declined to address issue raised for first  
28 time in objection to a magistrate judge’s report and recommendation). Even if this Court

were to consider Petitioner's argument, it does not undermine the R&R's finding that Petitioner had a full and fair opportunity to litigate her Fourth Amendment claim in state court and, thus, that the claim is barred by *Stone*. Nor does it undermine the R&R's conclusion that Petitioner's contention that the State waived its good faith exception argument is merely a contention that the state court misapplied state waiver law, and that federal habeas corpus relief does not lie for such an alleged misapplication of state law.

#### **d. Objection Four**

Petitioner next objects to the R&R's treatment of her prosecutorial misconduct claims. (Doc. 30 at 6-7.) She complains that "the R&R does not include a discussion of any of the unbelievable specific instances of reckless and willful prosecutorial misconduct" and goes on to list those instances. (*Id.*) She further complains that the R&R does not discuss "the special responsibilities of a prosecutor," the "cumulative or combined effect of prosecutorial misconduct which she argued on pages 21-22 of her Reply," or her "actual innocence claim which she included on page 25-27 of her Reply." (*Id.* at 7.) She also incorporates by reference arguments from pages 12-13 of her Reply.

This Court finds no error in the R&R's treatment of Petitioner's prosecutorial misconduct claims raised in Ground One, all but one of which the R&R finds to be procedurally defaulted without excuse. (Doc. 29 at 8-13.)<sup>3</sup> Petitioner's complaints that the R&R included an insufficient level of detail in discussing the factual and procedural background of her prosecutorial misconduct claims does not show any error in the R&R's procedural default determination. Petitioner argues on pages 12-13 of her Reply that a discussion of the merits of her claims is required as part of the prejudice prong of the cause-and-prejudice showing to excuse a procedural default, relying upon *Martinez v. Ryan*, 566 U.S. 1 (2012). (*Id.* at 12-13.) However, as the R&R recognizes, *Martinez* is inapplicable

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<sup>3</sup> Petitioner's Third Notice of Supplemental Authority, filed after the R&R was issued, cites a March 24, 2020 opinion by the Arizona Court of Appeals in *State of Arizona v. Jodi Ann Arias*, case number 1 CA-CR 15-0302. (Doc. 31.) Petitioner states that the discussion of prosecutorial conduct in that case supports Petitioner's prosecutorial misconduct claims in Ground One. (*Id.*) However, the Notice of Supplemental Authority does not explain how or why *Arias* supports Petitioner's arguments, nor does it point out how or where the R&R erred in its analysis of Ground One.

1 because Petitioner has not raised a claim of ineffective assistance of counsel. (Doc. 29 at  
 2 16-17.) The R&R did not err by failing to address the merits of Petitioner's procedurally  
 3 defaulted prosecutorial misconduct claims. Nor did the R&R err by failing to address the  
 4 cumulative effect of the alleged prosecutorial misconduct, since all but one of the  
 5 prosecutorial misconduct claims are procedurally defaulted.

6 Petitioner also argues on pages 12-13 of her Reply that the State's "repeated acts of  
 7 prosecutorial misconduct" qualify as a fundamental miscarriage of justice to excuse a  
 8 procedural default. (*Id.* at 12.) She also raises an actual innocence claim on pages 25-27 of  
 9 her Reply and submits four exhibits that she alleges establish actual innocence. The R&R  
 10 rejected Petitioner's fundamental miscarriage of justice argument, finding that Petitioner  
 11 had failed to show "that, considering new evidence, 'it is more likely than not that no  
 12 reasonable juror would have convicted [her].'" (Doc. 29 at 18 (quoting *Schlup v. Delo*,  
 13 513 U.S. 298, 327 (1995)).) Petitioner's Objection does not address this analysis.  
 14 Petitioner's allegations of prosecutorial misconduct do not establish actual innocence for  
 15 purposes of the fundamental miscarriage of justice exception. Furthermore, on de novo  
 16 review, the Court agrees with the R&R that Petitioner has failed to present new evidence  
 17 showing that no reasonable juror would have convicted her of aggravated DUI.

#### 18 **e. Objection Five**

19 Petitioner contends that the R&R erred when it found that Petitioner's claim raised  
 20 in Part Two of Ground Three was procedurally defaulted because Petitioner did not fairly  
 21 present the federal constitutional claim to the state courts. (Doc. 30 at 7-8; *see also* Doc.  
 22 29 at 14.) The R&R states, "While there may be similarities between Petitioner's  
 23 insufficient evidence claim under Arizona law and a due process sufficiency of evidence  
 24 claim, 'raising a state claim that is merely similar to a federal claim does not exhaust state  
 25 remedies.'" (*Id.* (quoting *Fields v. Waddington*, 401 F.3d 1018, 1022 (9th Cir. 2005)).)  
 26 Petitioner's Objection reasserts the argument raised in her Reply that Ariz. R. Crim. P. 20  
 27 "is inextricably interwoven with the right to jury trial guaranteed by the Sixth  
 28 Amendment." (Doc. 26 at 29-30.)

1           The R&R correctly found that Petitioner failed to raise a federal law basis for the  
 2 claim in Part Two of Ground Three before the Arizona Court of Appeals. (Doc. 29 at 13-  
 3 14, Doc. 21-3 at 75.) “If a petitioner fails to alert the state court to the fact that he is raising  
 4 a federal constitutional claim, his federal claim is unexhausted regardless of its similarity  
 5 to the issues raised in state court.” *Johnson v. Zenon*, 88 F.3d 828, 830 (9th Cir. 1996).  
 6 Petitioner’s argument concerning Ariz. R. Crim. P. 20 being “interwoven” with the right  
 7 to a jury trial guaranteed by the Sixth Amendment erroneously relies upon case law that  
 8 does not address exhaustion but, rather, addresses the issue of whether a state court decision  
 9 rests on an independent and adequate state law ground. (Doc. 26 at 29 (citing *Coleman v.*  
 10 *Thompson*, 501 U.S. 722, 732 (1991); *Michigan v. Long*, 463 U.S. 1032, 1040 (1983).)  
 11 Petitioner’s Objection does not undermine the R&R’s conclusion that Petitioner failed to  
 12 exhaust Part Two of Ground Three and that the claim is procedurally defaulted.

#### 13           **f. Objection Six**

14           Petitioner argues that the R&R erred in rejecting the claim raised in Ground Five of  
 15 her Petition. (Doc. 30 at 8-9.) In Ground Five, Petitioner argues that the trial court erred  
 16 when it denied Petitioner’s motion for alternative relief, including dismissal of the charge  
 17 with prejudice and suppression of the evidence, based on the State’s violation of its duty  
 18 to preserve a blood sample for Petitioner’s independent chemical analysis. *Supra* at 3. The  
 19 Arizona Court of Appeals addressed this argument on the merits and rejected it, finding  
 20 that “[b]ecause [Petitioner] had an unfettered opportunity to obtain an independent blood  
 21 sample for testing, the state did not violate her due process rights by inadvertently  
 22 destroying the second blood sample” and therefore the trial court did not err in denying her  
 23 motions for relief on that issue. (Doc. 21-3 at 77-8, Doc. 29 at 23-5.)

24           The R&R recognizes Petitioner’s argument that the Arizona Court of Appeals’  
 25 analysis conflicts with *Arizona v. Youngblood*, 488 U.S. 51 (1988). (Doc. 29 at 24.)  
 26 However, the R&R finds that Petitioner fails to explain how the Arizona Court of Appeals’  
 27 decision is contrary to, or involved an unreasonable application of, clearly established  
 28 federal law as determined by the United States Supreme Court. (*Id.* at 25); 28 U.S.C. §

2254(d) (The availability of habeas relief for a claim adjudicated on the merits is limited to circumstances where the state court’s disposition either (1) “resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States”; or (2) “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding”). The R&R applies *Youngblood* to Petitioner’s claim, as well as *California v. Trombetta*, 467 U.S. 479, 488-89 (1984) and finds that neither *Youngblood* nor *Trombetta* imposes a duty on the State to obtain potentially exculpatory evidence. (*Id.*) The R&R further finds that Petitioner is not entitled to habeas relief on Ground Five in the absence of any clearly established federal law imposing a duty on the state to collect potentially exculpatory evidence. (*Id.*); *Wright v. Van Patten*, 552 U.S. 120, 125-6 (2008) (a state court’s decision on an issue cannot be contrary to or an unreasonable application of federal law when there is no clearly established federal law directly addressing the issue). The R&R finds that Petitioner has not set forth any clearly established federal law which the state court unreasonably applied to Petitioner’s claim that the trial court erred in denying Petitioner relief due to the destruction of the blood sample; accordingly, the R&R finds that Petitioner is not entitled to habeas relief on Ground Five. (*Id.*)

Petitioner objects that the R&R misapplies *Youngblood*. (Doc. 30 at 9.) Petitioner further objects that the R&R fails to address *State of Arizona v. Robert Angel Gomez*, 246 Ariz. 237 (App. Div. 1, 2019), which Petitioner submitted as supplemental authority. (*Id.*, Doc. 27.)<sup>4</sup>

In *Trombetta*, law enforcement officers used an Intoxilyzer to measure the concentration of alcohol in the breath of the respondents, who were each charged with driving while intoxicated after the Intoxilyzer registered blood-alcohol concentrations substantially higher than 0.10 percent. 467 U.S. at 481-82. The law enforcement officers did not preserve samples of the respondents’ breath. *Id.* at 482. The United States Supreme

<sup>4</sup> As noted *supra*, federal relief does not lie for errors of state law. *Estelle*, 502 U.S. at 57-58 (1991). Accordingly, the Court will not address this aspect of Petitioner’s Objection.

1 Court held that due process “does not require that law enforcement agencies preserve  
2 breath samples in order to introduce the results of breath-analysis tests at trial.” *Id.* at 491.  
3 In reaching that conclusion, the Court noted that there was no evidence that the State  
4 destroyed the respondents’ breath samples in bad faith, the breath samples were more likely  
5 to provide inculpatory rather than exculpatory evidence, and the respondents did not lack  
6 other reasonably available means of obtaining comparable evidence. *Id.* at 488-90.

7 In *Youngblood*, the respondent was convicted by a jury of child molestation, sexual  
8 assault, and kidnapping. 488 U.S. at 52. The Arizona Court of Appeals reversed his  
9 conviction on the ground that the State had failed to preserve semen samples from the  
10 victim’s body and clothing. *Id.* (citing 153 Ariz. 50, 734 P.2d 592 (1986)). The Supreme  
11 Court “granted certiorari to consider the extent to which the Due Process Clause of the  
12 Fourteenth Amendment requires the State to preserve evidentiary material that might be  
13 useful to a criminal defendant.” *Id.* The Court held that “unless a criminal defendant can  
14 show bad faith on the part of the police, failure to preserve potentially useful evidence does  
15 not constitute a denial of due process of law.” *Id.* at 58. The Court found that the State’s  
16 failure to preserve evidence—in that case, semen samples and clothing—that could have  
17 potentially exonerated respondent did not violate due process. *Id.* at 57-8 (refusing to read  
18 the “fundamental fairness” requirement of the Due Process clause as “imposing on the  
19 police an undifferentiated and absolute duty to retain and to preserve all material that might  
20 be of conceivable evidentiary significance in a particular prosecution”).

21 Petitioner argues that *Youngblood* applies to the instant case and notes factual  
22 distinctions, in particular, the fact that here, the State was allowed to introduce the results  
23 of the Petitioner’s blood test (which yielded an analysis of 94 nanograms of clonazepam),  
24 whereas in *Youngblood*, the State did not use the test results in its case-in-chief. (Doc. 30  
25 at 9.) Petitioner also argues that the State prevented her from obtaining an independent  
26 drug content analysis. (*Id.*) However, this assertion is belied by the record, which shows  
27 that at the time of Petitioner’s blood draw, the phlebotomist advised her that she had the  
28 right to have her blood drawn and tested by an independent source, and further shows that

1 Petitioner did not request the blood sample from the State until almost five years after the  
2 DUI incident giving rise to this case. (Doc. 21-3 at 77.) While there are factual distinctions  
3 between the instant case and *Youngblood*, Petitioner’s arguments do not convince this  
4 Court that *Youngblood*’s holding—that, absent bad faith, a failure to preserve potentially  
5 exculpatory evidence is not a denial of due process—does not apply to this case. Moreover,  
6 Petitioner’s Objection does not argue that the R&R erred in finding that the Arizona Court  
7 of Appeals did not unreasonably apply *Youngblood*. Neither *Youngblood* nor *Trombetta*  
8 supports Petitioner’s claim in Ground Five, and Petitioner has not shown that the Arizona  
9 Court of Appeals unreasonably applied clearly established federal law when it held that the  
10 State’s destruction of Petitioner’s blood sample did not violate due process.

11 **g. Objection Seven**

12 Petitioner also objects that the R&R fails to address *Rehaif v. United States*, 139 S.  
13 Ct. 2191 (2019), which Petitioner submitted as supplemental authority. (Doc. 30 at 9-10;  
14 Doc. 28.) *Rehaif* holds that a federal sentencing statute authorizing imprisonment for up to  
15 ten years for a person who “knowingly” violates a separate statutory provision listing nine  
16 categories of individuals who cannot lawfully possess firearms, requires the person to know  
17 both that he possessed a firearm and that he “knew he had the relevant status when he  
18 possessed [the firearm].” 139 S. Ct. at 2194 (holding that the word “knowingly” applies to  
19 both the defendant’s conduct and status). Petitioner’s Second Notice of Supplemental  
20 Authority quotes language from the *Rehaif* opinion that she contends supports her  
21 arguments in Ground One and Part Two of Ground Three. (Doc. 28.) However, Petitioner  
22 does not explain how or why *Rehaif* supports these claims. Fed. R. Civ. P. 72(b)(2)  
23 (requiring “specific objections” to the R&R). Nor does Petitioner explain how *Rehaif*  
24 supports a finding that the R&R erred. *Id.*

25 **h. Certificate of Appealability**

26 The Court has reviewed Magistrate Judge D. Thomas Ferraro’s Report and  
27 Recommendation, the parties’ briefs, and the record. The Court finds no error in Magistrate  
28 Judge Ferraro’s Report and Recommendation. Accordingly, the Court will accept and

1 adopt the R&R, and deny the § 2254 Petition.

2       Petitioner requests a certificate of appealability. (Doc. 30 at 10.) Before Petitioner  
 3 can appeal this Court’s judgment, a certificate of appealability must issue. *See* 28 U.S.C.  
 4 §2253(c); Fed. R. App. P. 22(b)(1). A certificate may issue “only if the applicant has made  
 5 a substantial showing of the denial of a constitutional right.” 28 U.S.C. §2253(c)(2). In  
 6 the certificate, the court must indicate which specific issues satisfy this showing. *See* 28  
 7 U.S.C. §2253(c)(3). A substantial showing is made if “reasonable jurists could debate  
 8 whether . . . the petition should have been resolved in a different manner,” or if “the issues  
 9 presented were adequate to deserve encouragement to proceed further.” *See Slack v.*  
 10 *McDaniel*, 529 U.S. 473, 484-85 (2000) (internal quotation omitted). Upon review of the  
 11 record in light of the standards for granting a certificate of appealability, the Court  
 12 concludes that a certificate shall not issue, as the resolution of the Petition is not debatable  
 13 among reasonable jurists and does not deserve further proceedings.

14       Accordingly,

15       **IT IS ORDERED** that Defendant’s Objection (Doc. 30) is **overruled**, and the  
 16 Report and Recommendation (Doc. 29) is **accepted and adopted**, as set forth above.

17       **IT IS FURTHER ORDERED** that the Petition Under 28 U.S.C. § 2254 for a Writ  
 18 of Habeas Corpus (Doc. 1) is **denied**, and this action is **dismissed**. The Clerk of Court is  
 19 directed to enter judgment accordingly and close this case.

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